



THE COMMONWEALTH OF MASSACHUSETTS
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July 1, 2005

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: NSTAR Gas, D.T.E. 05-36

Dear Secretary Cottrell:

Enclosed for filing in the above referenced matter is the Attorney General's Appeal of the Hearing Officer's Ruling. Thank you for your attention to this matter.

Sincerely,

Colleen McConnell
Assistant Attorney General

enclosure

cc: Shaela McNulty Collins, Hearing Officer
Denise Desautels, Counsel for D.T.E. Pipeline Safety and Engineering Division
Robert J. Keegan, Esq.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

NSTAR Gas Company

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D.T.E. 05-36

**ATTORNEY GENERAL'S APPEAL OF THE HEARING OFFICER'S
RULING DENYING HIS INTERVENTION**

I. INTRODUCTION

Pursuant to 220 C.M.R. §§ 1.06(6)(d)(3), the Attorney General appeals the Hearing Officer's decision ("Ruling") to deny the Attorney General's Notice of Intervention. The Attorney General asks the Department of Telecommunications and Energy (the "Department") to reverse the Hearing Officer's Ruling and recognize that the Attorney General intervenes as of right in the Department proceedings pursuant to G.L. c. 12, §11E.

II. FACTS

On July 24, 2002, a natural gas explosion at a two and one-half story multi-family dwelling at 65 Main Street, Hopkinton, Massachusetts, an area served by NSTAR Gas Company ("NSTAR" or "Company"), caused the residential structure to partially collapse. While most of the residents at 65 Main Street managed to escape the building before the explosion, the entire Carey family, who resided on the second floor, were trapped. Heath and Tara Carey were ultimately able to escape, but their daughters, Violet and Iris, ages four and five, became trapped in their beds beneath the debris and died. *See* D.T.E. Pipeline Safety and Engineering Division Incident Report, p. 4 (November 6, 2003).

The Department's Pipeline Safety and Engineering Division ("Safety and Engineering

Division”), pursuant to G.L. c. 164, § 105A, and a Federal Certification Agreement as provided in 49 U.S.C. § 60105, investigated the incident.¹ On November 6, 2003, the Department issued a Notice of Probable Violation (“NOPV”) to NSTAR Gas stating that the Department had reason to believe violations of state and federal pipeline safety regulations may have occurred. The Safety and Engineering Division report alleges NSTAR Gas did not comply with a number of federal pipeline safety regulations:

- (1) NSTAR had no records to support that it tested the service lines to establish proper pressure and may not have tested those lines;
- (2) NSTAR did not monitor the steel service line in the basement of 65 Main Street for atmospheric corrosion in the 5 year period prior to the incident;
- (3) NSTAR failed to perform leakage surveys of the service lines located inside 65 Main Street; and
- (4) NSTAR failed to follow its written procedures for conducting operations and maintenance activities and emergency response.

NOPV Incident Report, pp. 33-34.

On December 10, 2003, pursuant to 220 C.M.R. §69.04(1)(d),² NSTAR submitted to the Department a response to the NOPV and stated that the Company intended “to contest the Division’s allegations and findings in all available jurisdictional venues, and therefore, the Company wishes to avail itself fully of the procedural remedies available under 220 C.M.R. 69.00.”³ Seventeen months later, on May 11, 2005, the Department issued a Notice of Procedural

¹ Upon notice of an incident, the Department conducts an investigation to determine the operator’s compliance with the Minimum Federal Safety Standards contained in 49 C.F.R. Part 192 and the Massachusetts pipeline safety regulations contained in 200 C.M.R. §§ 100-113.

² 220 CMR §§ 69.00 *et seq.* establish the procedures for determining the nature and extent of violations of Department codes and regulations pertaining to the safety of pipeline facilities and the transportation of natural gas.

³ The Company further stated “[a]ccordingly, prior to the initiation of an adjudicatory proceeding in this matter pursuant to 220 C.M.R. 69.06, the Company would be available pursuant to 220 C.M.R. 69.05 for an informal conference to review the allegations contained in the NPOV and the

Conference (“Notice”).⁴ The Notice stated that “any person interested in participating in this proceeding must file a written petition for leave to intervene in this proceeding no later than the close of business June 7, 2005.” *Id.*, pp. 1-2. On June 7, 2005, Heath and Tara Carey, the parents of Violet and Iris Carey, filed a petition to intervene. On June 8, 2005, pursuant to G.L. c. 12, §11E, the Attorney General filed his Notice of Intervention.⁵

At the procedural conference on June 24, 2005,⁶ the hearing officer ruled, *sua sponte*, that the Attorney General did not have the right, pursuant to G.L. 12, § 11E, to intervene in this matter since “this docket does not address any matter involving the rates, charges, prices, or tariffs of NSTAR Gas.”⁷ Tr., p. 6. The Hearing Officer also ruled that the Attorney General had not shown “good cause for his late filing.” *Id.* The Hearing Officer granted the Attorney General

Company's response to those allegations. Should the Division desire to proceed with such an informal conference prior to the commencement of an adjuducatory proceeding, [the Company is] available at your convenience to proceed with the scheduling of that conference. In the alternative, [the Company is] available for the scheduling of a pre-hearing conference to discuss the conduct of the applicable adjudicatory proceeding.” December 10, 2003 Cover Letter to the Company’s Response to the NOPV.

⁴ The Department did not conduct an informal review of the Company’s written reply. *See* 220 C.M.R. § 69.04(1) (the informal review shall consist of an informal conference...or an analysis of the company’s written reply under 220 C.M.R. §69.04(1)(d)).

⁵ The Department’s Order of Notice ordering publication of the Notice of Procedural Conference did not require service on the Attorney General. The Attorney General learned of the Procedural Conference through the Department hearing schedule for the week of June 6, 2005.

⁶ The procedural conference had originally been scheduled for June 10, 2005 but in a telephone call on June 9, 2005, the Hearing Officer informed the Attorney General the procedural conference would take place on June 24, 2005.

⁷ Neither NSTAR nor any other party has objected to the Attorney General’s Notice of Intervention or to his participation as a full party in this proceeding. The Company did, however, object to the Petition of Heath Carey and Tara Carey for Leave to Intervene on June 13, 2005. Tr., p. 7.

limited intervenor status.⁸ *Id.*, pp. 6-7. The Hearing Officer also rejected the petition of Heath and Tara Carey to intervene, but allowed them to participate as limited participants. NSTAR, the subject of the Safety and Engineering Division's inspection, is the only full party to the proceeding with cross examination and appeal rights.

III. STANDARD OF REVIEW

The Department's procedural rules provide the presiding officer with the authority to make all decisions regarding procedural matters which may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a). *See also Western Massachusetts Electric Company*, D.T.E. 97-120-3, p. 6 (1998); G.L. c.30A, §14(7). This power is broad but not unlimited. G.L. c. 30A, §10. When a presiding officer acts contrary to law or in an arbitrary manner or otherwise abuses his or her discretion, the Department must overturn a ruling or decision of the presiding officer. *See* G.L. c.30A, §14(7).

Pursuant to 220 C.M.R. § 1.03(1)(b), a petition for leave to intervene in a proceeding must describe the manner in which the petitioner is substantially and specifically affected by the proceeding. *See* G.L. c. 30A, §10. In ruling on a petition to intervene, the Department may grant a person leave to intervene as a party in the whole or any portion of a proceeding. 220 C.M.R. § 1.03(1)(e). Leave to intervene may be conditioned on such terms as the Commission or presiding officer may direct. *Id.* The Department must balance the interest of the intervenor against the need to conduct an efficient proceeding. *Boston Edison Company, Cambridge Electric Light*

⁸ As a limited participant, the Attorney General can receive copies of all filings, attend all hearings and conferences, and file a written brief at the close of hearings. Tr., p. 7. He is denied the opportunity to conduct discovery, cross examine and present witnesses and appeal the final decision of the Commission.

Company and Commonwealth Electric Company, D.T.E. 99-19-1, p. 9 (1999).

The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. *Boston Edison Company*, D.P.U. 90-335-A, p. 4 (1992).

Whether good cause has been shown "is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other party." *Id.*

IV. ARGUMENT

The Hearing Officer abused her discretion and acted contrary to law by denying the Attorney General's intervention as a full party in this case on the grounds that "this docket does not address any matter involving the rates, charges, prices, or tariffs of NSTAR Gas." Tr. 1, p. 6. The Hearing Officer's decision is particularly inexplicable since the Company did not raise this issue and neither the Company nor any other interested party objected to the Attorney General's intervention.

This case involves significant issues involving service quality and the Company's maintenance program which directly affect the service provided to customers and the rates NSTAR is permitted to charge customers for that utility service.⁹ "There is no such thing as a reasonable rate for service that is deficient." C. Philips, *The Regulation of Public Utilities* 553

⁹ The Attorney General has consistently asked the Department to hold adjudicatory proceedings for service quality issues. The Department has denied these requests. See *2002 Service Quality Reports for Electric Distribution and Local Gas Distribution Companies*, D.T.E. 03-10 through D.T.E. 03-23; *2003 Service Quality Reports for Electric Distribution and Local Gas Distribution Companies*, D.T.E. 04-12 through D.T.E. 04-25; and *Service Quality*, D.T.E. 04-116. Now that the Department has opened adjudicatory proceedings in this case, it seeks to exclude the Attorney General by denying him his statutory right to intervene.

(1993).¹⁰ A utility must be efficiently and economically managed and operated as a condition to the exercise of its right to impose rates adequate to cover the full cost of service and thus satisfy the investor requirement. *See Boston Edison Company*, D.P.U. 86-226-A/85-271-A, p. 14. The Legislature clearly intended that the Attorney General represent customer interests in proceedings before the Department, including those involving the “quality” of gas service provided. *See* G.L. c. 164, § 93. The Attorney General has properly intervened pursuant to G.L. 12, §11E. The issues in this case involve prudence of the Company’s actions in maintaining its distribution service which has a direct relation to the rates customers pay. The Department has long recognized the Attorney General’s right to intervene in Service Quality dockets.¹¹

In addition, the Hearing Officer’s ruling that the Attorney General’s Notice of Intervention was not timely filed unfairly placed new standards on the Attorney General. G.L. c. 12, §11E, does not prescribe any time constraints on the Attorney General’s intervention right, nor does it require any showing of “good cause” to file a Notice.¹²

¹⁰ The U.S. Supreme Court has held that a utility’s “[r]eturn should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, **under efficient and economical management**, to maintain and support its credit and enable it to raise the money necessary for discharge of its public duties.” *Bluefield Waterworks v. Public Service Commission*, 262 U.S. 679, 693 (1923)(emphasis added).

¹¹ The Department is currently investigating these same issues of monitoring and testing the distribution lines for pressurization and corrosion in the Bay State Gas Company rate case, in which the Attorney General properly intervened. *See Bay State Gas Company*, D.T.E. 05-27.

¹² The Attorney General can find no Department precedent requiring him to show “good cause” if he files his Notice of Intervention after the date set for parties who do not have a statutory right to intervene.

A. The Attorney General Properly Exercised His Statutory Right To Intervene.

According to the clear language of G.L. c. 12, § 11E, the Department does not have the discretion to determine when the Attorney General may exercise his right to intervene.¹³ The Attorney General is also a constitutional officer, authorized by common law and by statute to institute such proceedings before state and federal courts, tribunals and commissions as he may deem to be in the public interest. G.L. c. 12, § 10; *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262, 1266 (1977); *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163, 326 N.E.2d 344, 348 (1977).¹⁴

The Attorney General can find no cases where the Department attempted to exclude him intervention. Indeed, the Hearing Officer cites no such authority when attempting to impermissibly cabin the Attorney General's authority under G.L. c. 12, § 11E, to "intervene...in connection with any matter involving the rates, charges, prices or tariffs" of the Company. Tr., p. 6.

The issues in this proceeding involve the Company's possible violations of federal pipeline safety regulations governing the testing, monitoring, surveying, and operation and maintenance of the Company's service lines. Notice, p. 1. These issues have clear cost

¹³ The statute authorizes the Attorney General to intervene on behalf of public utility ratepayers in administrative proceedings involving rates, charges, prices or tariffs of any electric, gas, telephone or telegraph company doing business in Massachusetts and subject to the Department's jurisdiction. G.L. c. 12, § 11E.

¹⁴ The Attorney General exclusively represents the public generally. *Bolster v. Attorney General*, 306 Mass. 387, 389 (1940). Indeed, the Department has denied interested parties' petitions to intervene because the Attorney General is already "statutorily empowered to represent all ratepayers." *Massachusetts Electric Company*, D.T.E. 95-40, p. 7 (1995).

implications for the Company that would affect customers' rates. For example, if the Department finds that the Company is not in compliance with these regulations and orders the Company to come into compliance, then the Company may seek to recover the costs of this compliance in base rates. Since the outcome of this case clearly may affect customers' rates, the Attorney General properly exercised his right to intervene.

The Department has recognized the Attorney General's authority to intervene in numerous cases that, while not a formal "rate case," still involved issues that might affect customers. *See, e.g., NSTAR Electric Company*, D.T.E. 01-71A (2002)(investigation of the company's quality of service); *Boston Edison Company*, D.T.E. 98-118 (1999) (approval of company's application to issue rate reduction bonds); *Boston Edison Company and Commonwealth Electric Company*, D.T.E. 04-70 (2005) (approval of company's application to issue rate reduction bonds); *Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company*, D.T.E. 99-19-1 (1999)(merger of parent companies); *Boston Edison Company*, D.P.U./D.T.E. 97-63 (1998) (approval of merge plan); *Boston Gas Company*, D.T.E. 04-91 (2004)(approval of firm vapor service agreement); *Bay State Gas Company*, D.T.E. 02-75 (2004)(approval of long range forecast and resource plan); *Berkshire Gas Company*, D.T.E. 05-7(pending order on long range forecast and resource plan). Contrary to the Hearing Officer's present interpretation of G.L. c. 12, §11E, the Attorney General intervened as a matter of right in all of these cases as a full party.

The Attorney General also has consistently intervened in matters, such as the one now before the Department, reviewing of service quality. *See, e.g., NSTAR Electric Company*, D.T.E. 01-71A (2002); *Massachusetts Electric Company*, D.T.E. 01-71B, (2002); *Massachusetts*

Electric Company, D.T.E. 01-68 (2002); *Fitchburg Gas and Electric Company*, D.T.E. 01-71C, (2002); *Western Massachusetts Electric Company*, D.T.E. 01-71D (2002). The Department has also recognized the Attorney General's authority to intervene in cases where safety and reliability are at issue. See *Massachusetts Electric Company*, D.T.E. 01-68 (2002); *NSTAR Electric Company*, D.T.E 01-65 (2002). Similar to the focus on NSTAR's service lines in this case, the Department's focus in those cases was on the management of the Companies' distribution systems. *Id.* The Attorney General properly intervened as a matter of right in those cases that, depending on their outcome, could affect a company's rates or charges.

For the Hearing Officer to now make the determination that the Attorney General does not have the right to intervene in a case where such issues are to be decided is a clear abuse of discretion and contrary to law and Department precedent. "A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions." *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92, p. 104 (1975). Intervention in the Department proceedings is not subject to "the whim or caprice of the Department" in every case. *Id.*

The Attorney General, therefore, has the right to intervene in this matter with all of the rights of a full party participant.

B. The Hearing Officer Improperly Converted the Attorney General's Notice of Intervention Into a Petition To Intervene.

The Hearing Officer's denial at the procedural conference of the Attorney General's Notice of Intervention constructively converted his "Notice" into a "Petition" to Intervene,

subjecting it, without notice, to different standards of review. A petition for leave to intervene in a proceeding must describe the manner in which the petitioner is substantially and specifically affected by the proceeding. 220 C.M.R. §1.03(1)(b). A late filed petition must show good cause for the late filing in order to be allowed by the Department. 220 C.M.R. §1.01(4). Recognizing that G.L. c. 12, §11E, governs the Attorney General's right and authority to intervene, the Department has never before required the Attorney General to show that he is substantially and specifically affected by the proceeding or to file his notice within the other interested parties' filing deadlines to petition for leave to intervene.¹⁵ Because the Hearing Officer improperly imposed these new standards on the Attorney General, he had no opportunity to contest the Hearing Officer's interpretation of G.L. c. 12, §11E, or to cure any claimed defects in his Notice of Intervention before it was denied.¹⁶

If the Department does not allow the Attorney General to participate as a full party, the consumers' unique interests will not be represented in this proceeding. The Company is the only other full party in this case.¹⁷

The Safety and Engineering Division is the Department's enforcement arm ensuring that

¹⁵ The Attorney General generally files his Notices of Intervention in accordance with the Department's filing deadlines for petitions to intervene in order not to delay the proceedings. The filing of his notice in this case followed that date by only one day and occurred before the original procedural conference was scheduled.

¹⁶ The Attorney General, as the representative of customer and general public interest, was properly exercising his right to intervene under G.L. c. 12, §11E. He does not need to show the manner in which he is substantially and specifically affected by the proceeding, nor show good cause for his late filing. All customers are substantially and specifically affected by a company's failure to maintain its gas service lines.

¹⁷ The Hearing Officer denied the Petition of Heath Carey and Tara Carey for Leave to Intervene, but allowed them to be limited participants. Tr., p. 9.

operators of natural gas distribution companies are in compliance with state and federal regulations governing pipeline safety. The Division, while monitoring pipeline safety issues, does not evaluate cost related issues that arise when a Company needs to comply with safety regulations. In addition to concern about the safety and reliability of the Company's pipeline system, the Attorney General is also concerned for the ratepayers that may bear the burden of costs the Company incurs because of compliance. This is the role the Legislature conferred upon the Attorney General in G.L. 12, §11E, when granting him the authorization to intervene in these cases.

The Attorney General's Notice of Intervention to fulfill his statutory obligation to represent the ratepayers has not affected the proceedings, or caused prejudice to any of the parties, and his intervention as a full party participant will not impede the efficient consideration of this case.

V. CONCLUSION

For all of these reasons, the Department should grant this appeal, reverse the Hearing Officer's ruling and recognize that the Attorney General intervenes as a full party as is his right pursuant to G.L. 12, §11E.

Respectfully Submitted,

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By:

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July 1, 2005

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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NSTAR Gas Company)	D.T.E. 05-36
_____)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person on the service list compiled by the Secretary in this matter. Dated at Boston this 1st day of July, 2005.

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